STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JEAN YOUNG,

Plaintiff,

vs. Case No. 2005-1491-NI

MEIJER, INC., a Michigan Corporation and PBG MICHIGAN, LLC, a Foreign Limited Liability Company d/b/a PEPSI BOTTLING GROUP,

Defendants.
_____/

OPINION AND ORDER

This matter is before the Court on separate motions for summary disposition, pursuant to MCR 2.116(C)(10), by Meijer, Inc. ("Meijer") and PBG Michigan, LLC ("PBG").

I.

Plaintiff alleges that on November 24, 2003, she was a patron of Meijer's facility at 13 Mile Road and Little Mack in Roseville. She alleges that when she attempted to reach for a 12-pack of Pepsi, it fell onto both of her feet. In this regard, she alleges that the 12-pack was stuck to another 12-pack. She alleges negligence against Meijers, as the landowner, and against PBG, the entity responsible for supplying and stacking the Pepsi product. More specifically, she alleges that defendants breached their duty of care by failing to properly maintain the subject premises, failing to warn of hazardous conditions, and failing to provide a safer product.

II.

At the outset, the Court will set forth the applicable authority.

Standard of Review

In reviewing a motion brought under MCR 2.116(C)(10), the trial court must consider the pleadings, as well as any affidavits, depositions, admissions, and documentary evidence submitted by the parties. The evidence should be construed in the light most favorable to the party opposing the motion. The motion should be granted if the evidence establishes that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law. MCR 2.116(G)(4)-(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). It is not sufficient for the non-movant to promise to offer factual support for his position at trial. *Smith*, *supra*, at 457-458 n 2. Instead, the adverse party must produce evidence demonstrating that there is a genuine issue of material fact. MCR 2.116(G)(4).

Negligence

The elements of a negligence claim are: (1) the defendant owed a duty to the plaintiff; (2) the defendant breached such duty; (3) causation; and (4) damages. *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999). Generally, a business owner owes a duty to its customers to maintain its premises in a reasonably safe condition and to exercise ordinary care to keep it reasonably safe. *Id.* at 195.

To recover from a business owner for an injury resulting from an unsafe condition, the plaintiff must show either that an employee caused the unsafe condition or that a servant knew or should have known that the condition existed. *Whitmore v Sears, Roebuck & Co*, 89 Mich App 3, 8; 279 NW2d 318 (1979). In this regard, notice may be inferred from evidence that the unsafe condition existed for a length of time sufficient to have enabled a reasonably prudent business owner to have discovered it. *Id.* However, when there is no evidence that the unsafe

condition existed for a considerable length of time, a directed verdict in the business owner's favor is appropriate. *Id.*

While negligence may be established by circumstantial evidence, the occurrence of an accident alone is not sufficient. *Id.* at 9. Further, the plaintiff's theory of causation cannot be premised on mere speculation or conjecture. *Stefan v White*, 76 Mich App 654, 661-662; 257 NW2d 206 (1977).

III.

The Court will next address the motions at issue.

Meijer's Motion

Meijer contends that plaintiff's claims are based on mere speculation and there is no genuine issue of material fact that it is not responsible for her alleged injuries. However, plaintiff disputes such position.

The evidence shows that plaintiff, a retired individual, suffered from numerous health problems prior to the subject accident. By way of example, she had a torn rotator cuff, arthritis in her shoulder and fingers, and carpal tunnel syndrome in her wrists from lifting heavy objects around her home. Plaintiff's deposition at 37-40, 44. She favored her left arm since she did not have full use of her right arm due to a shoulder problem and her use of a cane. *Id.* at 38, 44. During other shopping excursions, she requested Meijer's employees to assist her with products she was unable to lift. *Id.* at 46.

On the date in question, she reached for a 12-pack carton of Pepsi with her left hand only. *Id.* at 9-10, 12. She did not use two hands to grab the carton because there were two ladies beside her and she did not want to "turn into them." *Id.* at 12. Apparently, she thought that the women were going to be at the display for a while. *Id.* at 21. Additionally, she indicated that she

"wasn't thinking." *Id.* at 12. Plaintiff acknowledged that, at the time of the accident, she regarded the carton of Pepsi to be "kind of heavy" and constituted something she would have difficulty in lifting. *Id.* at 20-21.

The were cartons stacked on top of each other and she pulled a carton from the very top by using the "loop" in the middle. *Id.* at 11-12. However, she was unable to recall how high the stack was. *Id.* She pulled a carton out half-way when she allegedly discovered that it was stuck to the carton underneath it. *Id.* She was stunned when the second carton came out with the first one. *Id.* at 12. The weight of the lower carton caused the cartons to jerk out of her hand. *Id.* at 17. According to plaintiff, the two cartons then separated at the floor, and one struck her left foot. *Id.* at 18. She thinks that it may have touched her right foot also because she saw blood on her little toe; however, it did not really hurt. *Id.* at 20. The accident did not cause her to fall down. *Id.* at 23. She continued to shop for a while and leaned on her cart. *Id.*

According to PBG's Merchandiser, PBG was responsible for delivering and shelving the pop. *See* Johathan Keiffer's deposition at 5-6. If two cartons stuck together, he would have to return them because the cardboard would rip and the cartons could not be sold. *Id.* at 23. Meijer's employees were not allowed to stock the Pepsi products. *Id.*

Meijer's Loss Prevention Coordinator testified that he was called to the area right after the accident and that the display in question had been stocked properly. Negar Esfahani's deposition at 16. He did not see any loose cans on the floor. *Id.* at 24. According to Esfahani, plaintiff managed to get one of the cartons into her cart. *Id.* He returned the other carton to the display after making sure that it was not "busted." *Id.* at 25. In this regard, he had not detected anything unusual about that carton. *Id.* He had not been aware of the existence of any customer complaints regarding pop cartons sticking together. *Id.* at 42.

Assuming *arguendo* that the cartons had been leaking, plaintiff failed to establish that Meijer's employees had caused the hazard. *Whitmore, supra.* She also failed to demonstrate that the alleged hazard had existed for a sufficient length of time to put Meijer on notice thereof. *Id.*

Plaintiff appears to suggest that Meijer had somehow destroyed the evidence. The Court is not persuaded by such position inasmuch as plaintiff herself took one of the cartons home.

Liability cannot attach to Meijer merely because an accident occurred. *Stefan, supra.* In considering the totality of evidence in the light most favorable to plaintiff, the Court opines that her claims are based on mere speculation and conjecture. *Id.* Under these circumstances, the Court concludes that the entry of summary disposition in Meijer's favor is appropriate under MCR 2.116(C)(10). *Smith, supra.*

PBG's Motion

PBG also argues that it is not liable for plaintiff's alleged injuries. However, plaintiff maintains that there is an outstanding factual dispute as to such issue.

According to both Meijer's Loss Prevention Coordinator and PBG's Merchandiser, it was up to the Pepsi vendor to stock the shelves. Esfahani's deposition at 7; Keiffer's deposition at 5-6. According to the November 24, 2003 Supplemental Guest Accident or Injury Report, the Pepsi cartons had been "packed three high on the bottom shelf." Plaintiff has failed to produce any evidence showing that the Pepsi products had not been properly stacked.

Contrary to plaintiff's theory, there is no evidence that either of the cartons at issue had been leaking or otherwise defective. The evidence shows that plaintiff put one of the cartons in her cart and the Loss Prevention Coordinator was unable to detect any damage to the other one upon inspection. Esfahani's deposition at 24-25.

PBG's Merchandiser testified that he had not been aware of a problem with cartons sticking together while customers were trying to pull them off the stack. Keiffer's deposition at 30-31. He also indicated that cans could leak or explode in the backroom of the store and that such products were sent back because they could not be sold. *Id.* at 21-23. Additionally, he acknowledged that a leak in a top carton could cause the carton below it to become wet. *Id.* at 22. When questioned as to whether he had any idea as to the cause of such leaks or explosions, he responded: "No really. People are dropping them, that's all I can think of." *Id.* at 24. He further stated that the defects could be caused by customers dropping the products and returning them to the shelves. *Id.* at 27. Moreover, he testified that as he was stacking the cartons, he looked them over to make sure they were not leaking. *Id.* at 29.

When asked about "possibly what happened," PBG's Merchandiser testified:

> I don't know exactly, but in probability they might have been wet and dried and then pulled off. That's all I would know. *Id.* at 34.

The Court finds that plaintiff has misplaced her reliance on the testimony of PBG's Merchandiser since it is highly speculative.

In her Amended Complaint, Plaintiff alleges that PBG had been negligent in failing to provide a "safer product." The Court opines that such allegation appears to sound in products liability. Further, plaintiff has failed to provide any persuasive evidence establishing that the Pepsi products and/or cartons were unsafe.

The Court points out that PBG is not liable for plaintiff's alleged injuries merely because an accident occurred. *Stefan, supra.* In considering all of the submitted evidence in the light most favorable to plaintiff, the Court opines that her claims against PBG are based on

impermissible speculation and conjecture. *Id.* Accordingly, the Court holds that the entry of summary disposition in PBG's favor is appropriate under MCR 2.116(C)(10). *Smith, supra.*

IV.

For the reasons set forth above, Meijer's motion for summary disposition, pursuant to MCR 2.116(C)(10), is GRANTED. PBG's motion for summary disposition, pursuant to MCR 2.116(C)(10), is GRANTED.

Pursuant to MCR 2.602(B), a judgment shall enter that is consistent with this *Opinion and Order.*

In compliance with MCR 2.602(A)(3), the Court finds that this decision resolves the last pending issue. This case shall close upon the entry of judgment.

IT IS SO ORDERED.

Diane M. Druzinski, Circuit Court Judge

Date: MAY 31 2006

DMD/aac

cc: Brian Muawad, Esq.
Constantine N. Kallas, Esq.

DIANE M. DRUZINSKI
CIRCUIT JUDGE

MAY 31 2006

A TRUE COPY
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